No. 72-822

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

THE RENEGOTIATION BOARD, *Petitioner*,

v.

BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC., *Respondents*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENT DAVID B. LILLY CO., INC.

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[1] Respondents Bannercraft Clothing Co., Inc. and Astro Communication Laboratory, a Division of Aiken Industries, Inc. are represented by separate counsel, who are filing a Brief on their behalf.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-44a)[2] is reported at 466 F.2d 345. The Findings of Fact, Conclusions of Law and Order of the District Court in *David B. Lilly Co., Inc. v. The Renegotiation Board* (Pet. App. 50a-60a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1972. On October 4, 1972, the Chief Justice extended the time within which to file a Petition for a Writ of Certiorari to November 18, 1972. The Chief Justice, on November 8, 1972, granted a further extension of time to December 4, 1972, and the Petition was filed on that date. On January 22, 1973, this Court granted the Petition for a Writ of Certiorari. 410 U.S. 907. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

QUESTION PRESENTED

Where, during the course of renegotiation proceedings, the Renegotiation Board ("Board") refuses to produce certain documents requested by the contractor, and where the contractor files an action under the Freedom of Information Act to obtain those documents,[3] does the

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[2] References to the Appendix filed with the Petition for a Writ of Certiorari are cited "Pet. App." and references to the Appendix filed separately in connection with the Renegotiation Board's Brief on the merits are cited "App."

[3] The applicability of the Freedom of Information Act to the Renegotiation Board is not disputed. *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F.2d 578 (1970).

District Court have the power to preliminarily enjoin the Board from proceeding further, until the Court can, on an expedited bases, rule on the contractor's entitlement to such documents for its use in the renegotiation proceedings?

STATUTES INVOLVED

The relevant sections of the Freedom of Information Act, 5 U.S.C. §552, *et seq.*, and of the Renegotiation Act, 50 U.S.C. App. §1211 *et seq.*, are set forth at Pet. App. 61a-67a.

STATEMENT

This action was filed on July 9, 1970 in the United States District Court for the District of Columbia by Respondent David B. Lilly Company, Inc. ("Lilly") for itself and as successor in interest to Delaware Fastener Corp. ("Delfasco"). During 1967 Lilly and Delfasco were Delaware corporations which, because of their performance under certain subcontracts relating to government procurement, were subject to the Renegotiation Act [50 U.S.C. App. §1211 *et seq.*]. Delfasco was merged into Lilly in January, 1970 after renegotiation proceedings as to each corporation for 1967 had begun, but before this action was filed. (App. 67, 75.)

As more fully set forth herein, Lilly filed this action against the Renegotiation Board ("Board") on July 9, 1970, seeking an injunction ordering disclosure of documents under the Freedom of Information Act [5 U.S.C. §552 *et seq.*] and an injunction against further renegotiation proceedings until its request for documents was resolved by the Court. This action was filed and pursued only after and in the context of the following chronology of events.

1. For two years, *i.e.*, from early 1968 (when renegotiation reports were filed by Lilly and Delfasco reporting income for 1967 subject to renegotiation) until June 4, 1970, Lilly and Delfasco had supplied information to the Board concerning their activities relevant to renegotiation and had received no notice as to what, if any, conclusions the Board had reached. (App. 67, 75.)

2. As of June 4, 1970, the Board's renegotiator, the initial staff member assigned to pursue renegotiation, had determined that Lilly and Delfasco had received excessive profits totaling $700,000 for 1967, which determination had been reached by him without the knowledge of, or notice to, Lilly and Delfasco. (App. 67-68, 75-76.)

3. As of June 4, 1970, the renegotiator's determination had been approved by a division of the Eastern Regional Renegotiation Board ("Eastern Board"), again without notice to, knowledge of or consultation with Lilly or Delfasco. (App. 67-69, 72, 75-76.)

4. At a meeting on June 4, 1970, Lilly was told by the renegotiator of what was, in effect, a *fait accompli*, namely that he, with approval of the Eastern Board, had made a $700,000 excessive profit determination and that Lilly could agree to the determination or appeal it to the Eastern Board which, as the renegotiator made clear, had already considered the case and approved the determination, all *in camera* as far as Lilly and Delfasco were concerned. (App. 67-68, 72, 75-76.) Lilly was also given the option to bypass the Eastern Board completely and appeal directly to the Board, thereby forfeiting the intermediate appeal stage. (App. 76.)

5. Lilly was given until July 10, 1970 to decide which course of action it would elect. It was told, on June 4, 1970, that if by July 10, 1970 it elected a hearing before the Eastern Board, such hearing would be held

within ten days of that election, but that if such a hearing were not elected by that date, the right to such a hearing would be lost. (App. 68, 71, 72, 76.) At that time, Lilly asked for, but was not told, the factual basis for the $700,000 determination of which it had just been advised. (App. 76-77.)

6. Since Lilly faced the risk that the $700,000 determination could be increased at either the Eastern Board or the Board levels (App. 77), it was necessary to learn the basis for the said determination in order first to decide whether to take the risk of going further and, if it so chose, then second to attempt to prepare an effective presentation which would meet, head on, whatever basis had been used by the Eastern Board in reaching its initial determination. Not having been given such information, Lilly, on June 29, 1970, formally requested a number of documents from the Board and further requested a speedy resolution as to documents in view of the then pending July 10, 1970 deadline for electing a course of action (App. 68, 72-74, 76-77.)

7. By July 9, 1970, one day before the deadline for electing how to proceed, the Board had neither acknowledged receipt of, nor otherwise responded to, the said June 29, 1970 written request for documents, and it was obvious by that time that there was no possibility of having the information, or studying it even if it were afforded, by the end of July 10. (App. 69, 71.) Consequently, on July 9, 1970, the instant case was filed, asking not only for an order compelling production of the documents requested, but also for an order restraining the Board from acting and particularly from requiring Lilly to make an election on July 10, the then cut-off date. (App. 71.)

8. In the afternoon of July 9, after the suit had been filed and at a hearing on Lilly's application for a temporary restraining order, an Assistant United States Attorney, representing the Board, agreed to rescind the July 10 deadline while the Board considered Lilly's request for documents, and as a result, Lilly withdrew its application for a temporary restraining order. (App. 80, 84, 87-88.) It was not the Board but the Board's General Counsel who reviewed the June 29 request, and by letter of July 24, 1970, he notified Lilly of his decision to afford none of the documents, advising that Lilly had 20 days to appeal his decision to the full Board. (App. 84, 94-96.) The General Counsel's letter was received on July 27, 1970, and on July 30, 1970, while Lilly still had more than two weeks to appeal, the renegotiator presented Lilly with the following ultimatum: within 24 hours, namely by July 31, 1970, Lilly had to decide whether to accept the $700,000 determination or appeal to the Eastern Board with a hearing on August 12, 1970, a date still within the 20-day appeal period which had been given Lilly as to the production of documents. (App. 84-85.) Lilly was advised that the Eastern Board's hearing would not be postponed, even though Lilly intended to appeal the General Counsel's decision within 20 days following July 24, and further that the August 12 hearing would go forward even if Lilly's appeal as to documents had not yet been resolved by the Board by that date. (App. 85.)

9. The ultimatum given to Lilly on July 30 was different from that existing on July 9 when suit was first filed. Initially, Lilly had been told that it had to elect a hearing by July 10 or forfeit a hearing. On July 30, Lilly was told that if it did not waive an Eastern Board hearing by July 31, such a hearing would be held on August 12

even if Lilly did not elect to have such a hearing. (App. 85.) In sum, on July 9, Lilly's failure to elect a hearing meant a forfeiture thereof; on July 31, Lilly's failure to elect or waive a hearing meant that an August 12 hearing would be held anyway.

10. On July 31, Lilly renewed its application for a temporary restraining order against further Board action, particularly aimed at restraining the Board from requiring Lilly to take any action (App. 81), namely from requiring Lilly to make an election by the close of July 31. When the Board refused to postpone either the July 31 deadline for such an election or the August 12 hearing date until the Board could review the appeal Lilly intended to file as to the decision on documents, the District Court, on July 31, entered a 10 day temporary restraining order prohibiting, *inter alia*, the Board from requiring Lilly to make an election and from prejudicing or curtailing Lilly's right either to request or decline an Eastern Board hearing (App. 90). The restraining order was thereafter extended for 10 days to August 20, 1970. (App. 92.) On August 6, 1970, Lilly appealed to the Board the General Counsel's decision denying all documents (App. 97-98), noting that Lilly's motion for a preliminary injunction was to be heard on August 20, 1970, and therefore requesting prompt attention in view of the August 20 date. (App. 98.) By letter of August 14, 1970, the Board denied Lilly's appeal, affirmed its General Counsel and refused to give any of the documents requested. (App. 99-101.) Thereafter, there was no further administrative remedy that Lilly could exhaust in attempting to obtain the subject information.

11. It was not until the morning of August 20, 1970, minutes before the preliminary injunction hearing, that the Board filed any response to Lilly's July 9 complaint,

affidavit, application for temporary restraining order and motion for preliminary injunction (App. 66-79) or to Lilly's July 31 affidavit, application for temporary restraining order and motion for preliminary injunction. (App. 81-88.) On August 20, the Board did not file an answer but, instead, filed a motion to dismiss or for summary judgment (App. 93). The papers so filed did not attack or deny the power of the court to issue an injunction.

12. As of August 20, 1970, more than two years had elapsed since commencement of renegotiation proceedings due to the Board's own timetable; and Lilly had voluntarily extended the limitations period. And, while the Board had waited 42 days to file any pleadings, it, at the same time, attempted to accelerate the administrative procedure by short and inflexible deadlines in terms of a day or days and by imposing inconsistent ultimatums without waiting first for the Board itself, and then for the Court, to resolve Lilly's Freedom of Information Act claims. Since Lilly had had only minutes to review the Board's motion papers, the court asked the Board's counsel if the Board would voluntarily refrain from further proceedings until Lilly could file a response and until the Court could resolve the case. When the Board refused, the Court entered a preliminary injunction to maintain the *status quo*. Before Lilly could file a response and before the District Court could rule on the question of documents, the Board appealed, and no further action has been taken by the District Court.

In its Brief (p. 23), the Board makes a point that Lilly is, in fact, benefiting by saving interest through the passage of time resulting from this litigation, and it couples this point with various references to the Board's regulations which, on their face, seem to afford a fair and

enlightened administrative procedure. (Renegotiation Board Brief, pp. 3-5.) Lest there be any inference that Lilly has deliberately eschewed an otherwise available, enlightened administrative procedure and has, instead, embarked upon groundless litigation for the purpose of delay and saving interest, we point out: first, this inference assumes that the Board is correct in its present $700,000 determination, a premature assumption at best; second, the Board overlooks the fact that much of the delay to date has resulted from the Board's own appeal, during which it has sought and obtained repeated extensions of time for filing its brief, as well as for filing its Petition and Brief in this Court; and third, the Board overlooks the fact that this suit was filed and pursued in the District Court only as a last resort when all requests from Lilly and the Court for even a modicum of flexibility were refused. It was not merely the denial of Freedom of Information Act rights which Lilly claimed, but it was a combination of a deprivation of those rights together with a threatened procedure of being pressed ahead in the dark and under unrealistic deadlines and ultimatums, all at a time when, despite the desirability of expedition generally, time in terms of days was certainly not of the essence. Whatever might be the scheme of procedural regulations as described by the Board in the STATEMENT portion of its Brief (pp. 3-5), it was applied neither in letter nor spirit to Lilly. Not wanting to forfeit its procedural rights or options, Lilly tried by informal requests and ultimately by judicial intervention merely to preserve those options. Lilly exhausted all administrative remedies quickly, was willing to withdraw its request for a temporary restraining order as long as extrajudicial agreement was possible and then, thereafter, under pressure from the Board, pursued the suit early in

the administrative process so that, had no appeal been taken and had the District Court been allowed to rule as to the documents, it is likely that the final renegotiation result may not have been delayed at all.

ARGUMENT

I.

THE FREEDOM OF INFORMATION ACT IMPLIEDLY PERMITS A DISTRICT COURT, UNDER ITS GENERAL EQUITY POWERS, TO ISSUE A PRELIMINARY INJUNCTION TO MAINTAIN THE STATUS QUO OF A BOARD PROCEEDING WHILE A FREEDOM OF INFORMATION ACT CLAIM IS SUB JUDICE.

The District Court had jurisdiction under 5 U.S.C. §552(a)(3) to adjudicate Lilly's Freedom of Information Act ("Act") claim and to issue an injunction compelling the Board to disclose documents. Since Section 552(a)(3) permits such an injunction, the question here is whether the Act permits the Court, if traditional equity requirements are otherwise satisfied, to preliminarily enjoin further administrative proceedings while the main issue of disclosure is *sub judice*. Put another way, the initial question is, as the Board argues, whether, in a suit for a permanent injunction compelling disclosure under the Act, the Act precludes any form of judicial relief beyond that expressly provided therein.

The Report of the Committee on Government Operations of the House of Representatives, entitled Administration of the Freedom of Information Act, H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (Sept. 20, 1972) concluded:

> The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-

> dragging by the Federal bureaucracy. [H.R. Rep. No. 92-1419, *supra*, 8.]
>
> * * * * *
>
> Information sought by plaintiffs from Government is likely to be a perishable commodity, and in many cases these procedural delays by Government attorneys—whether or not made in good faith—may result in substantive damage to the plaintiff's case. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy. [H.R. Rep. No. 92-1419, *supra*, 74.]

Six years earlier, when originally adopting the Freedom of Information Act in 1966, Congress also noted and sought to reverse the then "long-standing" practice under which federal agencies, including the Board, generally withheld records or delayed disclosure.[4] Since those seeking agency records might have only an illusory right to documents if disclosure were not ultimately made at a meaningful date, Congress sought to provide a remedy of "practical value"[5] to those attempting to deal with the various federal agencies "effectively and knowledgeably".[6] Hence, while Congress expressly provided for a remedy in the nature of an injunction compelling disclosure, it nowhere gave any hint, in either the statute or the legislative history, of a desire to abolish or preclude any other remedy necessary to assure that the ultimate disclosure had a "practical value" to those attempting to deal with an agency "effectively and knowledgeably."

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[4] H.R. Rep. No. 92-1419, 92d Cong., 2d Sess., 2 (1972); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 5, 8 (1966); S. Rep. No. 813, 89th Cong., 1st Sess., 3, 5 (1965).

[5] S. Rep. No. 1219, 88th Cong., 2d Sess., 7 (1964).

[6] S. Rep. No. 813, *supra*, 7.

Evidently, the long-standing objectionable custom and policies which, prior to 1966, thwarted or made illusory and impractical the rights to information, have, despite the passage of the Act, continued for six years, at least according to the above noted September 20, 1972 House Report No. 92-1419. It appears from this legislative history that Congress has been concerned, in 1966 as well as in 1972, not only with a citizen's right to have information, but also with the citizen's obtaining the information before its usefulness perished. At times, only a stay of agency proceedings can assure that an ultimate disclosure order will not be rendered moot in terms of its usefulness to the applicant, and that was exactly the situation below.

Consistent with the legislative purpose to provide a mechanism for compelling disclosure quickly so as to make the disclosure practical and meaningful, Sec. 552(a)(3) requires that claims under the Act be given priority on a District Court's docket, obviously to assure that the value of the information will not be diluted by the passage of time. When, as in the case at bar, information is being withheld and when, because of deadlines and ultimatums being imposed in terms of days, not even the speediest judicial procedure under Section 552(a)(3) could hope to finally resolve the issue by a meaningful time, it is no more than a logical extension of Section 552(a)(3) to permit a preliminary injunction to prevent the kind of time related erosion of value which Section 552(a)(3) is geared to avoid.

While the Board, in its Brief, is correct that "need" by an applicant for information is not a prerequisite to his obtaining the information under the Act, it is not correct to state that "need" is irrelevant in terms of the effective judicial enforcement of the Act. Indeed, if an agency

knew it might be enjoined from further proceedings, it might be less inclined to engage in the kind of historical practices which Congress has deplored, and the existence of the power to enjoin proceedings would have the salutary effect of promoting further compliance with the Act. Since the power to stay proceedings not only assures that rights under the Act will be vindicated at a meaningful time, but also acts as an inducement to agencies to abandon their long-standing obstructionist policies, such power is in every way consistent with, and in furtherance of, the purposes of the Act.[7]

Moreover, courts sitting in equity, such as the District Court in connection with Lilly's claims under the Act, have traditionally enjoyed broad remedial powers to fashion relief not inconsistent with express statutory purposes,[8] and, as this Court has observed, when Congress confers equitable jurisdiction, it does so in light of this traditionally broad residual equity power.[9] In *Porter*

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[7] *See*, H.R. Rep. No. 1497, *supra*, 9.

[8] *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). The power of the Federal Courts to issue interlocutory injunctive relief has been described as derived from its "inherent equity power or the so-called All Writs statute [28 U.S.C. § 1651(a)]." Jaffe, *Judicial Control of Administrative Action*, 656 and n. 14 (1965). *See also, Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 9-10 and n. 4 (1942); *Securities and Exchange Commission v. Barraco*, 438 F.2d 97 (10th Cir. 1971); *Naskiewicz v. Lawyer*, 456 F.2d 1166 (2d Cir. 1972); *Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission*, 285 F.2d 162 (9th Cir. 1960).

[9] *See, Clark v. Smith*, 13 Pet.195, 203 (1839), cited with approval in *Mitchell v. Robert De Mario Jewelry, Inc., supra*, at 292; *and see generally, United States v. DuPont & Co.*, 366 U.S. 316, 328, n. 9 (1961).

v. Warner Holding Co., 328 U.S. 395, 398 (1946),[10] this Court stated:

> [u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Hence, even if the legislative history and apparent purpose of the Act did not themselves strongly imply the authorization for an injunction against further proceedings as in this case, the Act would still have to be construed against the background of the test quoted above. Such an exercise in statutory construction would inevitably lead to the same conclusion, namely that the District Court had the power to exercise the full scope of its traditional and broad equity powers in order to do full justice; and that the court did not contravene the word, spirit or objective of the Act in issuing a preliminary injunction aimed at preventing the usefulness of any remedy it might ultimately order from being diminished in value or rendered moot.

Whether we say, then, that the grant of equity power to enjoin proceedings is affirmatively a part of the Act or, instead, is a necessary consequence of the just mentioned principle of statutory construction, the conclusion is the same, namely that the majority below was correct in stating (Pet. App. 14a-15a):

> [T]he usual presumption is that "if Congress had intended to make * * * a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co. v. Bowles, supra*, 321 U.S. at 329.

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[10] *See also, Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

and in concluding that (Pet. App. 16a):

> [Congress has not] deliberately withheld the tools necessary for courts to implement its substantive decisions. Since temporary stays of pending administrative procedures may be necessary on occasion to enforce the policy of the Freedom of Information Act, we hold that the District Court has jurisdiction to issue such stays.

Though not directly on point, it is somewhat instructive that the 1965 S. Rep. 813 accompanying S. 1160[11] reflected a Congressional awareness that courts, sitting in equity on claims under the Act, had the power to grant relief beyond that expressed in the Act itself, in the nature of awarding costs to the complaining party "as in other cases." (S. Rep. 813, *supra*, at 8.) Nowhere does the statute itself provide for the payment of costs in the court's discretion "as in other cases." Here, perhaps, we have the most direct, though admittedly not determinative, expression that Congress was not, by the language of the Act, attempting to preclude all other remedies, available in other cases, merely because they were not expressly provided for in the language of the Act itself. Of perhaps more significance is the fact that we need not merely presume, by principles of statutory construction, a Congressional awareness of the availability of other judicial powers; instead, the awareness was express when

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[11] S. 1160 was introduced in the 89th Congress and became the Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250 (5 U.S.C. §552), on July 4, 1966, effective July 4, 1967.

Congress enacted the Act.[12] Accord, Frankfurter, J., concurring in *Estep v. United States*, 327 U.S. 114, 140 (1946) [where habeas corpus, referred to in the legislative history of the Military Selective Service Act but ostensibly precluded as a remedy by that statute itself, was nevertheless implied as an available remedy under that statute].

There have been instances where even express prohibitions against judicial intervention in the framework of other statutes have not been read literally and where such intervention, by way of injunction against administrative proceedings, has been allowed. *See, e.g., Breen v. Selective Service Local Board No. 16*, 396 U.S. 460 (1970); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968); *Naskiewicz v. Lawver*, 456 F.2d 1166 (2nd Cir. 1972); *Aquavella v. Richardson*, 437 F.2d 397 (2nd Cir. 1971); *Coral Gables Convalescent Home v. Richardson*, 340 F. Supp. 646 (S.D. Fla. 1972); *cf., Enochs v. Williams Packing and Navigation Co., Inc.*, 370 U.S. 1 (1962).

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[12] Because the Congress made no "unequivocal statement" and because the Act itself does not prescribe "exclusivity", the Renegotiation Board's reliance on *United States v. Babcock*, 250 U.S. 328 (1919), is misplaced. (Renegotiation Board Brief, p. 15). In *Babcock*, the Court of Claims attempted to review a decision of the Treasury Department where the statute *expressly* provided that the Treasury Department's decision "shall be held as finally determined, and shall never thereafter be reopened or considered." *United States v. Babcock, supra*, at 331. Nor is the decision below inconsistent with this Court's observation in *Environmental Protection Agency v. Mink*, No. 71-909, decided January 22, 1973, slip op. 13, n. 13, that "courts are not given the option to impose alternative sanctions–short of compelled disclosure ...." The interlocutory injunctive relief here is *not an alternative* to disclosure. To the contrary, its purpose is to assure that the right to disclosure is not rendered meaningless or illusory.

In the instant case, there is no express statutory prohibition against a preliminary injunction such as here granted. To the contrary, while the Act is silent on the specific point, the scheme of the statute together with its history and purposes are consistent in indicating that such preliminary injunctive relief is implicitly very much a part of the Act. Certainly, such equitable relief is consistent with and in furtherance of the Act, and there appears to be no substantial reason for not permitting the exercise of powers traditionally inherent in a Court already vested with equity jurisdiction.

II.

LILLY EXHAUSTED ALL ADMINISTRATIVE REMEDIES NECESSARY AS A PREREQUISITE FOR SEEKING A PRELIMINARY INJUNCTION.

Lest there be any doubt that a court, even absent the express legislative grant of injunctive powers, may exercise its broad equity powers to enjoin administrative proceedings, the cases are many where courts have intervened when, during administrative proceedings, a person has been deprived of his rights under a federal statue,[13] agency regulation[14] or the Constitution.[15] We do not understand the Board to dispute this but, instead,

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[13] *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968); *Jewel Companies, Inc. v. Federal Trade Commission*, 432 F.2d 1155 (7th Cir. 1970).

[14] *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4 (1942); *Naskiewicz v. Lawver*, 456 F.2d 1166 (2nd Cir. 1972); *Murray v. Kunzig*, 462 F.2d 871 (1972), *cert. granted* 410 U.S. 981 (1973).

[15] *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773 and n. 38 (1947); *Damico v. California*, 389 U.S. 416 (1967).

the Board argues that such intervention was improper here because Lilly had not exhausted its administrative remedies before seeking judicial intervention. Correctly, the majority in the Court of Appeals concluded that because Lilly had exhausted its administrative remedies under the Act,[16] that, because the issue presented cannot be raised at the conclusion of the renegotiation process[17] and because a "clear threat to a statutory right" is at issue,[18] the District Court did not abuse its discretion in interceding as it did.

To make an informed judgment whether to accede to the renegotiator's determination or whether to appeal to the Eastern Board, Lilly requested that it be permitted access under the Act to certain Board records relating to the renegotiation proceedings in which it was involved before the Board's delegate, the Eastern Board. The request was perfectly consistent with Lilly's rights under the Board regulations aimed at assuring "consultation"[19] and "negotiation"[20] and with Lilly's right to be, at the initial level of the renegotiation process,

> afforded an opportunity to be heard on the information and data previously submitted by [it] and on any other matters considered pertinent to the case.[21]

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[16] Pet. App. 25a.

[17] Pet. App. 22a, 23a.

[18] Pet. App. 21a.

[19] Renegotiation Board Brief, p. 4.

[20] 50 U.S.C. App. §1215(a) (1973 pocket part); 32 C.F.R. 1472.3(b); 1472.3(i); 1472.4(d).

[21] 32 C.F.R. §1472.3(f).

and with its right at the Regional and Statutory Board levels to

> be afforded an opportunity to be heard on all matters considered pertinent to the case, including any unresolved issues or matters of fact, law or accounting.[22]

Plainly, Lilly did everything it could to obtain the needed information before seeking judicial intervention.[23] Lilly was refused any disclosure both by the Board's General Counsel[24] and by the Board itself upon review of the General Counsel's action.[25] No further administrative avenues were open or available to Lilly to obtain the withheld information. There can be no valid contention that Lilly failed to exhaust the administrative procedure for obtaining information.

Nor can there be any valid contention that Lilly should have been forced to go through the entire renegotiation procedure before seeking judicial intervention. After such procedure, Lilly's only recourse would be a Court of Claims suit on the merits, not on the procedural irregularities, and, of course, at that time a District Court

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[22] 32 C.F.R. §1472.3(h); 32 C.F.R. §1472.4(c).

[23] The potential harm to Lilly through deprivation of its rights under the Act was being compounded by the Board's apparent violation of the spirit, if not the letter, of its own regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1954).

[24] 32 C.F.R. §1480.7(b), (d).

[25] 32 C.F.R. §1480.7(e).

action would have been moot.[26] As noted in *McKart v. United States*, 395 U.S. 185, 193, (1969) and as recognized by the Board,[27] the "application of the doctrine of exhaustion of remedies to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." Here, the particular administrative scheme of the Renegotiation Act is critical.

Under the Renegotiation Act, 50 U.S.C. App. §1211, *et seq.*, and the Renegotiation Board Regulations, 32 C.F.R. §1472.3(e), (i); 32 C.F.R. §1472.4(b), (d), each stage of the renegotiation proceeding, as well as litigation in the Court of Claims, 50 U.S.C. App. §1218 (1973 pocket part), is a *de novo* proceeding. Hence, there will never be a time when Lilly will have the right to demand that a prior stage of the proceeding be reviewed for irregularities–substantive or procedural. And, despite the Board's suggestion in its Brief[28] that the Court of Claims

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[26] In this connection it is significant to recall that on July 30, 1970, three days after Lilly's receipt of a letter from the Board's General Counsel refusing any access to the requested information, the Eastern Board, despite the contractor's 20-day period to appeal the denial of documents, demanded that the contractor decide by the close of business on the next day (July 31, 1970) either to pay the $700,000 or to appear before a panel of the Eastern Board on August 12, 1970. Lilly asked that a later date be selected in order to permit the Board to review the decision of its General Counsel. The Eastern Board refused, insisting on a hearing on that date, whether or not the request for documents was still unresolved. (App. 85.)

[27] Renegotiation Board Brief, p. 28.

[28] Renegotiation Board Brief, p. 29.

may "review all issues of fact and law", the Renegotiation Act expressly proscribes *any review*:

> A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. [50 U.S.C. App. §1218 (1973 pocket part).]

The Court of Claims cannot hear, leave alone decide, the question of whether Lilly had been denied procedural rights, and the Court of Claims has no authority to remand to cure such denial, no matter how egregious. Once a stage in the renegotiation process is passed, the contractor has no right to have a remand to cure even the most flagrant error. It is in this regard that renegotiation differs from other administrative proceedings where there is judicial review of both substantive and procedural matters, and where remand to correct irregularities is available.[29] In renegotiation, once procedural rights are lost at a stage in the proceedings, those rights are lost forever. As the majority in the Court of Appeals observed:

> Because the statutory review procedures are all *de novo*, the review will be geared to a determination of whether in fact appellees realized excess profits. Clearly the reviewing bodies will not consider whether the contractors could have negotiated better settlements at a lower level if they had had access to the disputed documents. Nor will these

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[29] *See, e.g., Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Jewel Companies, Inc. v. Federal Trade Commission*, 432 F.2d 1155 (7th Cir. 1970).

> bodies consider the possibility that if the documents had been made available appellees might not have appealed at all and thus not risked imposition of more extensive liability. [Pet. App. 22a.]
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> The seemingly endless *de novo* reviews were intended to make the negotiating process work, not to provide a substitute for negotiation. If the negotiating process fails to occur, the opportunity is lost forever. To say that compulsory awards imposed by the Board or the Court of Claims at the end of the process provide an adequate remedy is to ignore the difference between an agreement freely arrived at, as preferred by Congress, and a judgment imposed by a court of law. [Pet. App. 23a.]

And, it was a recognition of the unique absence of review in renegotiation[30] that led the majority to find:

> [I]t should be apparent here that if the contractors are to be granted relief at all they must have it now

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[30] This lack of review in renegotiation distinguishes this case from the Sixth Circuit decision in *Sears, Roebuck and Co. v. National Labor Relations Board*, 433 F.2d 210 (1970). Under the National Labor Relations Act, as the Sixth Circuit noted, National Labor Relations Board decisions are reviewable in the United States Court of Appeals both as to substantive and procedural matters. 29 U.S.C. §160. On review, the court can cure an NLRB denial of procedural rights by remanding the matter for a further, or new, and proper hearing. Thus, if Sears' statutory rights were frustrated by the NLRB's refusal to comply with the Freedom of Information Act before concluding its proceedings, the administrative proceedings could be reopened after Sears had secured a remand and a proper administrative hearing afforded. *See*, in this connection, *Sears, Roebuck & Co. v. National Labor Relations Board*, 473 F.2d 91 (D.C. Cir. 1972), *petition for certiorari pending*, No. 72-1503.

> before that administrative momentum carries their cases beyond the point where the harm can be undone. [Pet. App. 23a.]

The Board's response to the opinion below appears to be that, even though the exhaustion doctrine is to a degree a flexible or discretionary one, nevertheless renegotiation proceedings can never be subject to judicial intervention. In so arguing, the Board relies upon *Lichter v. United States*, 334 U.S. 742 (1948); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); and *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540 (1946). To be sure, in the circumstances presented in each of the cases, this Court disapproved judicial intervention as premature. The cases do not, however, support the blanket rule claimed by the Board, nor do they support a conclusion that the District Court here overstepped its bounds.

In *Macauley v. Waterman Steamship Corp.*, *supra*, the question presented was whether or not the Maritime Administration had authority to renegotiate contracts made between Waterman and the British Ministry of War Transport. The resolution of this question hinged on a resolution of factual issues intertwined with an interpretation of the coverage of the Renegotiation Act. This Court rejected Waterman's attempt to litigate this question of coverage because the Act expressly committed the initial determination of such questions to the administrative body.

In *Lichter v. United States*, *supra*, this Court did in fact consider Lichter's attack on the constitutionality of the Renegotiation Act on its face (334 U.S. 791-792),

and after upholding the constitutionality, ruled (*id.*, 792-793):

> [W]e hold that the respective petitioners do not have the right to present questions as to the coverage of that Act, as to the amount of excessive profits adjudged to be due from them or as to other comparable issues which might have been presented by them to the Tax Court upon a timely petition to that court for a redetermination of excessive profits, if any.

In the instant case, Lilly did not ask the District Court to resolve any issue that should otherwise have been, under *Lichter*, properly submitted first to the Board or the Court of Claims.

Moreover, in upholding the constitutionality of the statute in *Lichter*, this Court relied upon its prior decision in *Opp Cotton Mills v. Administrator of Wage and Hour Division*, 312 U.S. 126, 152, 153 (1941), stating:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." [*Lichter v. United States, supra*, 334 U.S. at 791-792.]

At the time that this Court wrote its decision in *Lichter*, renegotiation involved a two-stage proceeding—the first, before the Renegotiation Board, and the second, before the Tax Court of the United States, an independent agency in the Executive Branch. Since 1971, the second stage is before the Court of Claims, a court established under Article III of the Constitution of the United

States.[31] As a result of this change, there is no longer a two-stage administrative proceeding. Instead, there is an administrative proceeding before the Renegotiation Board, which can be followed by a proceeding before the Court of Claims. Thus, if a contractor is to have a due process hearing at the administrative level, the hearing must be held before the Renegotiation Board proceedings are concluded.

In *Aircraft & Diesel Equipment Corp. v. Hirsch, supra,* the contractor sought to litigate in the court issues then pending and undetermined in the Tax Court. This Court, quoting from its opinion in *Macauley, supra,* decided:

> "Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act." [*Aircraft & Diesel Equipment Corp. v. Hirsch, supra,* 331 U.S. at 766.]

As regards the voluminous constitutional challenges made in *Aircraft & Diesel,* this Court declined decision. Instead, this Court simply observed that the contractor had "an adequate remedy at law" to raise such issues in the Tax Court, where the matter was pending, or in a collateral proceeding.[32] Moreover, this Court did not, as the Board

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[31] Pub. L. 92-41, 85 Stat. 97, amended the Renegotiation Act to substitute the Court of Claims for the Tax Court. The Court of Claims is established pursuant to 28 U.S.C. §171.

[32] The collateral proceeding suggested consisted of suits in the District Court by Aircraft & Diesel against its customers. This Court reasoned that if the administrative agency, as had been threatened, took steps to have Aircraft & Diesel's customers pay to the government the money owed to Aircraft & Diesel, the contractor would have a right of action against its customers. Because, under the Act, the government was required to indemnify the customers, Aircraft & Diesel's suits against the customers would, in effect, be suits against the government.

contends, rule out a District Court's intervention in an appropriate case. As Professor Jaffe notes in his treatise, *Judicial Control of Administrative Action*, 669 (1965):

> *Aircraft* [*& Diesel Equipment Corp. v. Hirsch, supra,*] did not intimate that there was no judicial power to preserve the status quo by staying the administrative action until the prescribed administrative review was completed. As a matter of fact, it seemed at one place to say just the opposite; to Aircraft's contention that the suit it had brought in the district court was its only real remedy, the Court replied that this was not so, that Aircraft had the right to sue its customers for the money being withheld pursuant to the directives of the Under Secretary of War. Indeed, in a footnote to its opinion, the Court said:
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> "It is unnecessary to consider whether in such a suit a district court should find it proper to defer its final decision until after the Tax Court had made its final redetermination. . . . For, even in the event of such action, *the court would have power to preserve, pending the administrative decision, the status quo and all rights of the appellant.*" [Emphasis added by Professor Jaffe.]

Here, unlike in the cited cases, there is no attempt to wrest from the Board or the Court of Claims matters committed to them for decision. The decision of the District Court merely preserved the *status quo*—it has no substantive effect on the amount, if any, of Lilly's renegotiation liability.

The enlightened consultation and negotiation, called for by the Board's own regulations, would seem to

incorporate, at least in spirit, the disclosures required by the Act so that the two, hand-in-hand, will act to give a contractor the fairest opportunity successfully to confront the Board and its *in camera* determinations. While not an issue before this Court, there appears, as the District Court recognized, a substantial likelihood of success by Lilly in obtaining the documents requested.[33] Under all the circumstances, it would have been an extremely harsh result had the District Court not intervened in the face of a threat by the Board to run roughshod over Lilly's rights under both the Act and the Board's regulations when there was not a countervailing need on the part of the Board.

CONCLUSION

The decision of the Court below should be affirmed.

Respectfully submitted,

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[33] *See, Grumman Aircraft Engineering Corp. v. The Renegotiation Board,* ___ F.2d ___ (D.C. Cir., Docket No. 71-1730, decided July 3, 1973).